RECORD AND BRIEFS

No. 141, Original

In The
# Supreme Court of the United States

STATE OF TEXAS,

*Plaintiff,*

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

*Defendants.*

**On Motion To Dismiss**

## CITY OF LAS CRUCES' *AMICUS CURIAE* BRIEF IN SUPPORT OF STATE OF NEW MEXICO'S MOTION TO DISMISS TEXAS' COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iii

INTEREST OF *AMICUS CURIAE* ..... 2

BACKGROUND ..... 4

1. Rio Grande ..... 4
2. Rio Grande Project ..... 6
3. Lower Rio Grande Adjudication ..... 6

SUMMARY OF ARGUMENT ..... 9

ARGUMENT ..... 12

POINT I: Texas and the United States have Failed to State a Claim upon which Relief can be Granted ..... 12

A. Texas and the United States have not pled a violation of the Rio Grande Compact ..... 13

B. Texas and the United States seek to modify, not enforce, the Rio Grande Compact ..... 16

C. The United States seeks to federalize the Lower Rio Grande in New Mexico ..... 17

POINT II: The Lower Rio Grande Adjudication is the only Forum to Determine Administrable Water Rights in the Lower Rio Grande ..... 20

A. Water rights derived under New Mexico law must be adjudicated under New Mexico law ..... 21

TABLE OF CONTENTS – Continued

Page

B. An administrable decree must include all water rights in the Lower Rio Grande, including the United States' Rio Grande Project water right ..... 23

C. The United States' Rio Grande Project water right is nearly resolved in the LRG Adjudication ..... 25

D. State administration is required for the adjudication decree ..... 26

CONCLUSION ..... 27

## TABLE OF AUTHORITIES

Page

CASES

*Arizona v. California*, 373 U.S. 546 (1963).....15

*Ashcroft v. Iqbal*, 556 U.S. 662 (2009) .....13, 21

*Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).....13

*California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).....19

*California v. United States*, 438 U.S. 645 (1978).....11, 19, 22

*City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds*, 563 F. Supp. 379 (D.N.M.1983), *aff'd on reh'g*, 597 F. Supp. 694 (D.N.M.1984) .....14

*El Paso County Water Impr. Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894 (W.D.Tex.1955), *aff'd*, 243 F.2d 927 (5th Cir. 1957) .....15

*Elephant Butte Irrigation Dist. v. Regents of New Mexico State University*, 849 P.2d 372, 115 N.M. 229 (Ct. App. 1993)..... 7, 14-15

*Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).....24, 25

*Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).....22

*Mississippi v. Louisiana*, 506 U.S. 73 (1992).....12

*Nebraska v. Wyoming*, 507 U.S. 584 (1993).....20

*New Jersey v. New York*, 523 U.S. 767 (1998).....15

TABLE OF AUTHORITIES – Continued

Page

*Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 973 (10th Cir. 2002) ..... 15

*State ex rel. Reynolds v. Allman*, 427 P.2d 886, 78 N.M. 1 (1967) ..... 24

*State ex rel. Reynolds v. Sharp*, 344 P.2d 943, 66 N.M. 192 (1959) ..... 23

*State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3rd Jud. Dist. filed Sept. 24, 1996) ..... *passim*

*Texas v. New Mexico*, 462 U.S. 554 (1983) ..... 15, 27

*Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 239 P.3d 1232, 2012-NMSC-0397 ..... 9

*United States v. New Mexico*, 438 U.S. 696 (1978) ..... 11, 19, 22

*United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899) ..... 18

STATUTES

Laws of the Territory of New Mexico 1905, ch. 102, § 22 ..... 6, 22

Laws of the Territory of New Mexico 1907, ch. 49, § 40 ..... 6, 22

McCarran Amendment, 43 U.S.C. § 666 (1952) ..... 7

N.M. Stat. § 72-2-9.1 (2003) ..... 9

TABLE OF AUTHORITIES – Continued

Page

N.M. Stat. §§ 72-4-13 through 72-4-19 (1907, as amended through 2012) ..... 6, 7

N.M. Stat. § 72-5-33 (1995) ..... 22

Reclamation Act of 1902, 32 Stat. 388 ..... 6, 22

Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ..... *passim*

RULES

Fed. R. Civ. P. 12(b)(6) ..... *passim*

Sup. Ct. R. 17(2) ..... 12

Sup. Ct. R. 37.4 ..... 2

TREATISES AND OTHER AUTHORITIES

H.R. Doc. No. 319, *Documents on the Use and Control of the Waters of Interstate and International Streams: Compacts, Treaties, and Adjudications* (1968) ..... 15

Raymond Hill, *Development of the Rio Grande Compact of 1938*, 14 Nat. Resources J. 163 (1974 No. 2) ..... 15, 16

S.E. Reynolds, and Philip B. Mutz, *Water Deliveries Under the Rio Grande Compact*, 14 Nat. Resources J. 201 (1974 No. 2) ..... 15

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## CITY OF LAS CRUCES' *AMICUS CURIAE* BRIEF IN SUPPORT OF STATE OF NEW MEXICO'S MOTION TO DISMISS TEXAS' COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION[1]

When the Court granted Texas' Motion for Leave to File Complaint in *Texas v. New Mexico and Colorado*, Original, No. 141, it stated that New Mexico could file a motion to dismiss "in the nature of a motion under Rule 12(b)(6), Federal Rules of Civil Procedure." *See* Court's Order dated January 27, 2014. On April 30, 2014, New Mexico filed a Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention in the original action.

[1] All parties received timely notice of the City's intent to file an *amicus curiae* brief.

The City of Las Cruces ("City" or "Las Cruces") submits this *amicus curiae* brief in support of New Mexico's Motion to Dismiss pursuant to Sup. Ct. R. 37.4, to bring to the Court's attention related municipal water supply issues unique to the City.

## INTEREST OF *AMICUS CURIAE*

Las Cruces is the second largest city in New Mexico and is located south of Elephant Butte Reservoir. The City was founded in the mid-1800s and received its first municipal water supply from the Acequia Madre around 1846. Because of the unreliability of the surface water, Las Cruces transitioned to wells in 1905, thereby initiating its municipal groundwater rights. Today the City is responsible for providing a potable water supply to more than 100,000 people. Las Cruces is one of the fastest growing municipalities in the United States and its population is expected to exceed 150,000 by 2050. The City's water supply comes solely from groundwater wells located in the Lower Rio Grande Underground Water Basin.

Las Cruces is a party to a general stream system adjudication of all interrelated surface water and groundwater rights in the Lower Rio Grande.[2] *See State of New Mexico ex rel. State Engineer v. Elephant*

[2] "Lower Rio Grande" as used in this brief refers to the Rio Grande Basin in New Mexico between Elephant Butte Reservoir and the New Mexico-Texas state line.

*Butte Irrigation Dist., et al.*, No. CV-96-888 (3rd Jud. Dist. filed Sept. 24, 1996) ("LRG Adjudication"). The LRG Adjudication is defining, quantifying, and prioritizing all water rights in the Lower Rio Grande, including that of the Rio Grande Project. The United States' Rio Grande Project water right has largely been determined in the LRG Adjudication. Las Cruces is a party to the LRG Adjudication for a determination of its water rights and for potential *inter se* challenges against other water right claimants. *See infra* at 6-9.

Texas' Complaint and the United States' Complaint in Intervention place into issue the nature of the Rio Grande Project water right and the proper forum for the determination of that right. This has major repercussions for the City's municipal water supply. If New Mexico's Motion to Dismiss is granted, the LRG Adjudication Court will complete a judicial determination of the Rio Grande Project water right in the near future.[3] The Rio Grande Project water right below Elephant Butte Reservoir will be administered in priority along with all other state-based water rights. The only way there will be a unified administrable decree, however, is if all interrelated water rights are adjudicated, including the Rio Grande Project water right. State administration, if done properly, will protect all water rights in the

[3] The New Mexico Supreme Court appointed a Water Judge to preside over the LRG Adjudication ("LRG Adjudication Court").

Lower Rio Grande, including those of the Rio Grande Project and Las Cruces.

If New Mexico's Motion to Dismiss is not granted, Las Cruces' municipal groundwater rights are directly threatened in Texas' Complaint and the United States' Complaint in Intervention. This results from Texas' and the United States' interpretation that the Rio Grande Compact: 1) requires specific state line deliveries, although contrary to the express language of the Compact; 2) results in a *de facto* apportionment of the Lower Rio Grande that ignores Las Cruces' water use and locks Las Cruces and New Mexico, but not Texas, into 1938 water use conditions; 3) divests New Mexico of jurisdiction over all surface water and groundwater in the Lower Rio Grande, assuming all groundwater is hydrologically connected to the surface water; and 4) places Las Cruces' state-based groundwater rights in jeopardy and requires the City to obtain a water supply contract from the United States to divert groundwater used for municipal purposes, despite Las Cruces' senior priority to the Rio Grande Project.

## BACKGROUND

### 1. Rio Grande.

The Rio Grande rises in the San Luis Valley in Colorado, flows southward into New Mexico, and then into Texas. The river was apportioned among the states of Colorado, New Mexico, and Texas by the Rio Grande Compact of 1938. *See* Rio Grande Compact,

Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact"). Through an inflow/outflow formula, the Rio Grande Compact limits stream depletions upstream of Elephant Butte Reservoir.

Colorado is obligated to deliver a percentage of the gauged inflow at the New Mexico-Colorado state line under Article III of the Rio Grande Compact. This delivery obligation is measured by a gauging station at Lobatos, Colorado.

In New Mexico, the Rio Grande flows through the state into Elephant Butte Reservoir located approximately 100 miles north of the New Mexico-Texas state line. Article IV of the Rio Grande Compact, as amended, specifies New Mexico's delivery obligation as being into Elephant Butte Reservoir and is determined as a percentage of the inflow recorded at a gauging station at Otowi, New Mexico. A resolution of the Rio Grande Compact Commission in 1948 changed New Mexico's delivery obligation from San Marcial into Elephant Butte Reservoir.

The Rio Grande is administered as three separate stream systems in New Mexico. The Upper Rio Grande runs from the New Mexico-Colorado state line to Otowi Gauge. The Middle Rio Grande is situated between the Otowi Gauge and Elephant Butte Reservoir, and the Lower Rio Grande stretches from the outlet works of Elephant Butte Reservoir to the New Mexico-Texas state line.

Prior to either the Rio Grande Project or the Rio Grande Compact, Las Cruces initiated and maintained a municipal water supply for a growing city.

**2. Rio Grande Project.**

Pursuant to the Reclamation Act, the United States initiated the acquisition of a surface water right for the Rio Grande Project by filing Notices of Intent to Appropriate with the New Mexico Territorial Engineer in 1906 and 1908. *See* Reclamation Act of 1902, §§ 2 and 8, 32 Stat. 388; *see also* Laws of the Territory of New Mexico 1905, ch. 102, § 22 and Laws of the Territory of New Mexico 1907, ch. 49, § 40. The Notices of Intent sought to reserve then-unappropriated surface water upstream of Elephant Butte Reservoir for storage in the reservoir for use in the Rio Grande Project.

Once released from Elephant Butte Reservoir, Rio Grande Project surface water is allocated between Elephant Butte Irrigation District ("EBID"), located in New Mexico, and El Paso County Water Improvement District No. 1 ("EP No. 1"), located in Texas. Administration of Rio Grande Project water released from Elephant Butte Reservoir was not addressed in the Rio Grande Compact, and therefore is governed by a combination of contracts and state and federal law.

**3. Lower Rio Grande Adjudication.**

A general stream system adjudication is a special statutory proceeding set forth in N.M. Stat. §§ 72-4-13 through 72-4-19 (1907, as amended through 2012).

An adjudication decree filed pursuant to N.M. Stat. § 72-4-19 must declare the following:

> as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.

The LRG Adjudication was initiated in the 1980s and began in earnest in the 1990s in state district court in New Mexico.

Las Cruces has a two-fold interest in the LRG Adjudication. First, the City seeks judicial recognition of its water rights to supply the municipal needs of up to 150,000 people in the near future. Second, Las Cruces must be prepared to challenge *inter se* other defendants' water right claims. The City's right to due process is only protected if all water rights claimants (indispensable parties) are present and joined to a decree for post-adjudication administration.

Despite its opposition, the United States was joined to the LRG Adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1952), for the determination of its Rio Grande Project water right. *See Elephant Butte Irrigation Dist. v. Regents of New Mexico State University,* 849 P.2d 372, 115 N.M. 229 (Ct. App. 1993). A judicial determination of the United States' Rio Grande Project water right is

nearly complete. The LRG Adjudication Court has held that groundwater is not part of the Rio Grande Project water right.[4] It has also quantified the United States' Rio Grande Project right to store, release, and divert surface water at specified downstream points of diversion.[5] The only issue still pending is a determination of the Rio Grande Project priority date which is scheduled for trial.

The City of El Paso, which takes a portion of EP No. 1's water for municipal use, is a party to the LRG Adjudication and EP No. 1 has been an active *amicus*

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[4] The LRG Adjudication Court held that "New Mexico law . . . controls the determination of the source or sources of water for the Project." *See* Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3rd Jud. Dist. filed Aug. 16, 2012) at 4. It found that the "points of diversion constructed by the United States and utilized for the Project, coupled with the notices describing the water to be appropriated as water from the Rio Grande and its tributaries, indicate that the United States has established a right to *surface water* under New Mexico law. . . ." *Id.* at 6 (emphasis added).

[5] *See* Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference, *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3rd Jud. Dist. filed Feb. 17, 2014).

*curiae,* filing briefs and presenting oral arguments in that case.[6]

While a final adjudication decree will ultimately be utilized for administration of all interrelated surface water and groundwater rights in the Lower Rio Grande, the New Mexico Supreme Court has upheld the statutory authority of the State Engineer to administer water rights without a final adjudication decree pursuant to Active Water Resource Management Regulations. *See Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 239 P.3d 1232, 2012-NMSC-039; N.M. Stat. § 72-2-9.1 (2003).

## SUMMARY OF ARGUMENT

Texas and the United States argue that it was "understood" that the Rio Grande Compact requires the delivery of a specific amount of water at the New Mexico-Texas state line, despite contrary language in the Compact. They argue that the Rio Grande Compact resulted in a tacit apportionment of the waters of the Lower Rio Grande, resulting in New Mexico being locked into 1938 conditions without any consideration of Las Cruces' existing and future municipal water use. Texas and the United States then posit that all surface water and hydrologically connected groundwater below Elephant Butte Reservoir in New

[6] El Paso supported by EP No. 1 recently moved to stay proceedings in the LRG Adjudication on issues related to the United States' Rio Grande Project water right.

Mexico are Rio Grande Project water, which the United States contends cannot be diverted without obtaining a water supply contract from it. *See* United States' Complaint in Intervention at 4, ¶¶ 12 and 13. This position results in New Mexico being divested of state jurisdiction over all surface water and groundwater in the Lower Rio Grande, assuming that all groundwater is hydrologically connected, thereby threatening the viability of Las Cruces' water supply.

Texas and the United States are wrong for two reasons. First, New Mexico's delivery obligation under the Rio Grande Compact is at Elephant Butte Reservoir, not the New Mexico-Texas state line. *See* Rio Grande Compact at Art. IV, as amended. New Mexico cannot violate a compact provision that does not exist. The relief Texas and the United States seek, *viz.*, state line deliveries, would result in modification, not enforcement, of the Rio Grande Compact to the exclusion of Las Cruces' interests which were not included in the Compact.

Moreover, the United States contends that all surface water and hydrologically connected groundwater in the Lower Rio Grande is Rio Grande Project water. Assuming all groundwater is hydrologically connected to surface water, the United States' attempt to "enforce" the Rio Grande Compact results in a federalization of the Lower Rio Grande, with all surface water and groundwater users in New Mexico being regulated by the United States, not

New Mexico. This is contrary to *California v. United States*, 438 U.S. 645 (1978) and *United States v. New Mexico*, 438 U.S. 696 (1978) which confirm that states have plenary control over the waters within their borders. The United States' argument places Las Cruces' adjudicated groundwater rights obtained under state law at risk. It would require the City to enter into a water supply contract with the United States to divert groundwater in the Lower Rio Grande for municipal use, despite that the City's groundwater use was initiated more than 100 years ago, prior to the Rio Grande Project. Texas' and the United States' allegations in this regard do not "plausibly give rise to an entitlement to relief." *See infra* Point I.

Second, Texas and the United States would have the Court wade into a determination of the Rio Grande Project water right, something that has already been largely accomplished in the LRG Adjudication. By effectively removing the United States' interests, the LRG Adjudication Court could not fashion a unified decree for administration of the interrelated water rights in the Lower Rio Grande. *See infra* Point II.

## ARGUMENT

### POINT I

### TEXAS AND THE UNITED STATES HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The standard for granting a motion for leave to file a complaint in an original action is different from that required to sustain an action against a motion to dismiss. When evaluating a motion for leave to file a complaint in an original action, the Court emphasizes two factors – "the nature of the interest of the complaining state" with a focus on the "seriousness and dignity of the claim" and "the availability of an alternative forum in which the issues tendered can be resolved." *See Mississippi v. Louisiana,* 506 U.S. 73, 77 (1992).

Under Fed. R. Civ. P. 12(b)(6), however, a party may seek to dismiss a complaint by asserting the "failure to state a claim upon which relief can be granted."[7] The purpose of such a motion is to test the legal sufficiency of the pleader's claims for relief, assuming that non-conclusory, well-pleaded factual allegations are true, and determining whether those factual allegations can support a claim for relief.

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[7] Pursuant to Sup. Ct. R. 17(2) "[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence may be taken as guides."

In deciding a motion to dismiss, a court evaluates a complaint's legal sufficiency under a two-pronged analysis – first segregating conclusory allegations from those that constitute "well-pleaded" allegations, and then determining whether the latter only, accepted as true, "plausibly give rise to an entitlement to relief." *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *see also Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007).

Here, Texas and the United States allege that New Mexico has violated provisions of the Rio Grande Compact. A review of the Compact, however, demonstrates that even if accepted as true, the allegations do not give rise to Compact violations.[8] Texas and the United States fail to plead allegations that even if accepted as true, "plausibly give rise to an entitlement to relief" and New Mexico's Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) should be granted.

## A. Texas and the United States have not pled a violation of the Rio Grande Compact.

Despite contrary language, Texas and the United States allege that New Mexico has violated the Rio Grande Compact by allowing the diversion of surface

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[8] In applying the two-prong test, Las Cruces has not segregated "conclusory allegations" from "well-pleaded" allegations in Texas' Complaint and the United States' Complaint in Intervention. Instead, it has focused on the second prong because the allegations, whether conclusory or well-pleaded, do not "plausibly give rise to an entitlement to relief."

water and groundwater between Elephant Butte Reservoir and the New Mexico-Texas state line beyond 1938 conditions. *See* Texas' Complaint at ¶¶ 4, 10, 11, 18, and 19. Texas and the United States improperly transform Rio Grande Project water supply allocations below Elephant Butte Reservoir into state line Compact delivery obligations.

New Mexico's delivery obligation into Elephant Butte Reservoir under Article IV of the Rio Grande Compact and the absence of a state line delivery obligation have previously been addressed. In *City of El Paso v. Reynolds*, a federal district court held that "New Mexico is obligated to make delivery not at the New Mexico-Texas state line but 'into Elephant Butte Reservoir.'" *See City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds*, 563 F. Supp. 379, 384 (D.N.M.1983), *aff'd on reh'g*, 597 F. Supp. 694 (D.N.M.1984). The Court further observed that neither the history of the Compact negotiations nor the ultimate terms of the Compact "support the conclusion that the parties to the agreement intended it to apportion either the surface water of the river or the related ground water below Elephant Butte between New Mexico and Texas." *Id.* The district court stated the Compact "did not apportion any specified amount of water to Texas below Elephant Butte." *Id.* at 385.

An identical conclusion was reached by the New Mexico Court of Appeals when it held that the "Rio Grande Compact is unique because Texas agreed to have water delivered at Elephant Butte Dam, approximately 100 miles north of the state border, rather than at the state line." *See Elephant Butte Irrigation*

*Dist. v. Regents of New Mexico State University,* 849 P.2d at 378. A federal district court in Texas agreed, stating that the Rio Grande Compact:

> has a number of peculiar provisions. For example, the water New Mexico must pass to Texas is delivered not where the two States meet, but at San Marcial, New Mexico, more than 100 miles above the point where the Rio Grande leaves New Mexico. This delivery is made into the reservoir of the Elephant Butte Dam . . . .

*See El Paso County Water Impr. Dist. No. 1 v. City of El Paso,* 133 F. Supp. 894, 907 (W.D.Tex.1955), *aff'd,* 243 F.2d 927 (5th Cir. 1957); *see also Rio Grande Silvery Minnow v. Keys,* 469 F. Supp. 2d 973, 996 (10th Cir. 2002); H.R. Doc. No. 319, *Documents on the Use and Control of the Waters of Interstate and International Streams: Compacts, Treaties, and Adjudications*, at 272-91 (1968); Raymond Hill, *Development of the Rio Grande Compact of 1938*, 14 Nat. Resources J. 163 (1974 No. 2); and S.E. Reynolds, and Philip B. Mutz, *Water Deliveries Under the Rio Grande Compact,* 14 Nat. Resources J. 201 (1974 No. 2).

There is no state line delivery obligation for New Mexico in the Rio Grande Compact. Once a compact has been ratified by the states and Congress, its terms are binding and "no court may order relief inconsistent with its express terms." *See Texas v. New Mexico*, 462 U.S. 554, 564 (1983); *see generally Arizona v. California*, 373 U.S. 546, 565-66 (1963); *New Jersey v. New York*, 523 U.S. 767, 811 (1998). In this

case, Texas and the United States are seeking relief inconsistent with the express terms of the Rio Grande Compact. New Mexico's Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) should be granted.

### B. Texas and the United States seek to modify, not enforce, the Rio Grande Compact.

Because the Rio Grande Compact states nothing about a delivery obligation at the New Mexico-Texas state line, the relief that Texas and the United States seek would result in modification, not enforcement, of the Compact to the detriment of Las Cruces.

As stated by the Commissioner negotiating the Rio Grande Compact for New Mexico, "for the purposes of the Compact, Elephant Butte Dam should be deemed to be the dividing line between New Mexico and Texas." *See* Hill, *supra,* at 172. This is crucial to Las Cruces because only equities above Elephant Butte Reservoir were considered and evaluated in determining New Mexico's allocation of water under the Rio Grande Compact. New Mexico's equities below Elephant Butte Reservoir were not considered.

Had New Mexico's delivery point under the Rio Grande Compact been at the state line instead of into Elephant Butte Reservoir, equities south of Elephant Butte Reservoir, principally Las Cruces' interests, as the state's second largest city, would had to have been included in determining New Mexico's allocation

of Lower Rio Grande water. The fictional compact which Texas and the United States seek to enforce makes the absurd assumption that New Mexico approved a compact which limited water rights below Elephant Butte Reservoir to the irrigation interests of the Rio Grande Project with the full understanding that there could be no groundwater diversions by Las Cruces. New Mexico never would have ratified such a compact intentionally excluding the City's interests.

Texas' and the United States' allegations in this regard, even if assumed to be true, should be dismissed under Fed. R. Civ. P. 12(b)(6).

### C. The United States seeks to federalize the Lower Rio Grande in New Mexico.

In its Complaint in Intervention, the United States discloses the drastic remedy that it seeks. The United States alleges that New Mexico has "allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary [of the Interior] or are using water in excess of contractual amounts." *See* United States' Complaint in Intervention at 4, ¶ 13. It contends that only persons having contracts with the Secretary are entitled to Rio Grande Project water and the only

entity in New Mexico with a water supply contract with the United States is EBID. *Id.* at ¶ 12.

The United States is claiming ownership of all surface water and groundwater rights in the Lower Rio Grande in New Mexico, assuming all groundwater is hydrologically connected to the surface water. The effect of the United States' argument is to divest New Mexico of its plenary control and administration over the water resources within its borders and to federalize this section of the Rio Grande, placing Las Cruces' water rights in jeopardy.

As a result of the Public Land Acts of 1866, 1870, and the Desert Land Act of 1877, ownership of the United States in non-navigable waters was severed from the public domain and vested in the western states and territories. *See United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 702-09 (1899). The principle was confirmed several years later by the Court:

> What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris, subject to the plenary control of the designated states,* including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since "congress cannot enforce either rule upon any state," *Kansas v. Colorado*, 206 U.S. 46, 94, 27 S. Ct. 655, 666,

> 51 L.Ed. 956, the full power of choice must remain with the state.

*California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935) (emphasis added). *See also California v. United States*, 438 U.S. at 645 and *United States v. New Mexico*, 438 U.S. at 696. Accordingly, New Mexico, not the United States, has the ability to regulate and administer surface water and groundwater rights in the Lower Rio Grande. Las Cruces' water rights are based on that principle of law.

In granting the United States' request for a surface water right upstream of Elephant Butte Reservoir to store in the reservoir for the benefit of the Rio Grande Project, New Mexico did not implicitly give the Lower Rio Grande to the United States to the exclusion of all other surface water and groundwater users in the State.

The United States' contention that it owns all surface water and hydrologically connected groundwater in the Lower Rio Grande could have significant adverse consequences for Las Cruces. Assuming all groundwater is hydrologically connected to the surface water, the City would be forced to enter into water supply contracts with the United States, presumably abandoning its state-based groundwater rights. After more than 100 years of obtaining its municipal water supply from state-based groundwater rights without objection from the United States, water rights that pre-date the Rio Grande

Project, the United States should be estopped from claiming that it, not New Mexico, should be the regulator of groundwater in the Lower Rio Grande. As the Court confirmed in *Nebraska v. Wyoming*, 507 U.S. 584 (1993), long-standing acquiescence in an administrative practice can foreclose later arguments to the contrary. *Ibid.* at 595 ("And even if the issue was not previously determined [in prior litigation], we would agree with the Special Master that Wyoming's arguments are foreclosed by its postdecree acquiescence.").

The United States' Complaint in Intervention is legally insufficient to survive a motion to dismiss with respect to its allegations of ownership of all surface water and groundwater in the Lower Rio Grande.

## POINT II

## THE LOWER RIO GRANDE ADJUDICATION IS THE ONLY FORUM TO DETERMINE ADMINISTRABLE WATER RIGHTS IN THE LOWER RIO GRANDE

Texas and the United States seek to remove issues related to the United States' Rio Grande Project water right in New Mexico that have been and are being determined as a matter of state law in the LRG Adjudication and have them litigated as Rio Grande Compact issues in the Court's original jurisdiction.

Texas and the United States have failed to plead allegations that even if assumed to be true, "plausibly give rise to an entitlement to relief." *See Ashcroft v. Iqbal*, 556 U.S. at 679. Their complaints lack legal sufficiency because the Rio Grande Compact cannot be "enforced" by removing an indispensable claimant from the LRG Adjudication to declare a putative Compact right that can avoid state priority administration. New Mexico's Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) should be granted.

### A. Water rights derived under New Mexico law must be adjudicated under New Mexico law.

The Rio Grande Project water right is a state-based water right, not a right derived from the Rio Grande Compact. In 1902, the Reclamation Act was passed by Congress and requires the United States to acquire its water rights pursuant to state law. Specifically, Section 8 of the Reclamation Act states:

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator,

> or user of water in, to, or from any interstate stream or the waters thereof:

*See* Reclamation Act of 1902, § 8, 32 Stat. 388.

Pursuant to the Reclamation Act of 1902, the United States' Rio Grande Project water right was initiated and acquired pursuant to state law through Notices of Intent to Appropriate filed with the New Mexico Territorial Engineer in 1906 and 1908. *See* Laws of the Territory of New Mexico 1905, ch. 102, § 22 and Laws of the Territory of New Mexico 1907, ch. 49, § 40; N.M. Stat. § 72-5-33 (1995). The United States is a water user, not a water rights regulator with the authority to give contracts to other water users.

Many cases confirm the states' plenary control over their water resources. In *California v. United States, supra,* the Court found that "[t]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *See California v. United States*, 438 U.S. at 653. In *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (10th Cir. 1981), the Tenth Circuit held: "[i]t generally can be said that state law governs the distribution of water from federal projects unless Congress expresses a different approach." Similarly, in *United States v. New Mexico*, 438 U.S. at 702, the Court held: "Where Congress has expressly addressed the question of whether federal entities must abide by

state water law, it has almost invariably deferred to the state law."

Because the Rio Grande Project water right derives from New Mexico law, it must be adjudicated under New Mexico law and placed in a decree for unified administration.

### B. An administrable decree must include all water rights in the Lower Rio Grande, including the United States' Rio Grande Project water right.

For there to be an administrable decree in the Lower Rio Grande, the LRG Adjudication must include all interrelated surface water and groundwater rights in the basin, including the United States' Rio Grande Project water right.

There are approximately 18,000 defendants in the LRG Adjudication claiming rights to surface water and groundwater, with 14,000 active subfiles, and more than 5,000 subfile orders which have been entered. Removing the United States' Rio Grande Project water right from the LRG Adjudication will prevent there from being a unified, administrable decree.

An adjudication is an inherently *inter se* proceeding. The rights adjudicated to one party affect those adjudicated to another. The adjudication is not final until a process has been completed in which all individual claimants are entitled to contest the rights adjudicated to other defendants. *See State ex rel. Reynolds v. Sharp,* 344 P.2d 943, 66 N.M. 192 (1959);

*State ex rel. Reynolds v. Allman*, 427 P.2d 886, 78 N.M. 1 (1967). Some courts in New Mexico employ a two-phase process and others have combined the first phase and the *inter se* phase of an adjudication in an effort to promote judicial efficiency. This latter process was done in the LRG Adjudication in which "stream system issues" have been litigated in one proceeding where all defendants in the adjudication are joined for the determination of that right. The key issue is providing due process to appear and be heard in making an *inter se* challenge.

Texas and the United States view the Rio Grande Project water right as being a "Compact right" superior to other state-based water rights. The implication is that the LRG Adjudication should be completed for all water rights, except that of the Rio Grande Project which in their view is not subject to adjudication or priority administration.[9] They rely on a misreading of *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) for this theory. A review of that case, and placing the Rio Grande Project water right in proper context, demonstrates that *Hinderlider* is indeed applicable, but only if the LRG Adjudication includes the Rio Grande Project water right.

*Hinderlider* concerned the La Plata River & Cherry Creek Ditch Co. whose water rights had been

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[9] *See* Brief for the United States as *Amicus Curiae* at 20 ("Texas's Compact apportionment must be respected by New Mexico regardless of the claims of its water users to Rio Grande water under New Mexico law.").

adjudicated in state proceedings in 1898. *See Hinderlider*, 304 U.S. at 98. The La Plata River Compact subsequently apportioned the river through equitable principles between New Mexico and Colorado in 1925. Under the Court's decision in *Hinderlider*, the Ditch Company's water rights could not be exercised under certain flow conditions until New Mexico's compact obligations were met.

In this case, the United States' Rio Grande Project water right must be incorporated into and become an integral part of a final LRG Adjudication decree – not apart from it. If the United States and Texas force the removal of the United States' Rio Grande Project water right and prevent it from being adjudicated, they will deny Las Cruces and all other LRG Adjudication defendants due process to challenge the United States' Rio Grande Project water right obtained under state law and destroy the possibility of a unified, adjudication decree that would allow administration under *Hinderlider*.

### C. The United States' Rio Grande Project water right is nearly resolved in the LRG Adjudication.

The adjudication of the United States' Rio Grande Project water right is nearly complete in the LRG Adjudication. *See supra* at 6-9. All issues have been resolved except the Rio Grande Project priority date.

Despite the resolution of these issues, Texas and the United States, seemingly unsatisfied with the

outcome of the LRG Adjudication, are attempting to relitigate these issues as "Compact issues" in the original jurisdiction of the Court.[10] Removing a determination of the Rio Grande Project water right now cannot be done without denying Las Cruces due process of law and impairing the ability of the City to protect its interests.

### D. State administration is required for the adjudication decree.

The purpose of an adjudication is to provide a decree containing a full description of the water rights adjudged to each party. Following the entry of an adjudication decree, administration is then undertaken by the State Engineer. The Court has declined to undertake decree administration of the kind that Texas and the United States seek. As the Court stated in *Texas v. New Mexico*:

> We have expressly refused to make indefinite appointments of quasi-administrative officials to control the division of interstate waters on a day-to-day basis, even with the consent of the States involved. *E.g., Vermont v. New York*, 417 U.S. 270 (1974); *Wisconsin v. Illinois*, 289 U.S. 710, 711 (1933) (citation omitted). Continuing supervision by this Court of water decrees would test the limits

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[10] The United States has the right to appeal the LRG Adjudication Court's determination of its Rio Grande Project water right.

> of proper judicial functions, and we have thought it wise not to undertake such a project. *Vermont v. New York, supra*, 417 U.S., at 277 (citation omitted).

*See Texas v. New Mexico*, 462 U.S. at 566. A final adjudication decree in the Lower Rio Grande should be administered by New Mexico, not the Court.

## CONCLUSION

For the foregoing reasons, Texas' Complaint and the United States' Complaint in Intervention fail to state a claim upon which relief can be granted and should be dismissed under Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

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